
CHICAGO BAR
ASSOCIATION

53593

120 I.A.3 68

MARTIN DENENBERG,
Plaintiff-Appellant,

v.

PRUDENCE MUTUAL CASUALTY COMPANY,
Defendant-Appellee.

Appeal from the Circuit Court of Cook County.

Frank S. Loverde, M.

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order under section 72 of the Civil Practice Act (Ill.Rev.Stat., 1967, ch. 110, sec. 72) vacating a judgment which had been entered for the plaintiff. The plaintiff's initial action was for the value of certain securities deposited with the defendant, Prudence Mutual Casualty Co., under the terms of an agency contract. Prudence filed an answer denying liability and a counterclaim seeking recovery for liabilities it incurred because of the plaintiff's failure to meet his obligations under the contract. The trial court entered an ex parte judgment for the plaintiff because of the defendant's failure to appear at a deposition hearing. More than thirty days thereafter the defendant filed a petition to vacate the judgment, alleging that its attorney had informed the office of the plaintiff's counsel that he would be unable to appear for the deposition and had been advised that it would be rescheduled for another date. The petition also alleged that its attorney received no notice of the plaintiff's motion for judgment. The petition and an amended petition were denied. However, on rehearing within thirty days of the denial the trial court granted the amended petition and vacated the judgment.

The plaintiff and the defendant filed briefs in this court and the case, as requested, was set for oral argument. Subsequently the argument was waived and the case submitted on the briefs.

Although the plaintiff filed a brief, he has failed to file either an abstract of the record or excerpts from the record as required by Supreme Court Rule 342, Ill.Rev.Stat., 1967, ch. 110A, sec. 342. The abstract or the excerpts constitute the pleading of the appellant in a court of review and they must contain everything necessary to decide the issues raised in the appeal. Gribben v. Interstate Motor Freight System Co., 38 Ill.App.2d 123, 186 N.E.2d 100 (1962). It is the duty of the appellant to present an abstract (or excerpts) sufficient to set forth every error relied upon for reversal. Dempski v. Dempski, 27 Ill.2d 69, 187 N.E.2d 734 (1963). A deficient abstract may be overlooked, inadequate excerpts disregarded, but the failure to file either abstract or excerpts warrants dismissal.

On appeal, all reasonable presumptions are in favor of the judgment of the trial court, and the party who prosecutes an appeal has the burden of overcoming these presumptions by affirmatively showing the errors charged. Husted v. Thompson-Hayward Chemical Co., 62 Ill.App.2d 287, 210 N.E.2d 614 (1965). Although the entire record is available to the reviewing court (Rule 342(g)) the court is not required to search the record to find a reason for reversing the judgment. Elden v. Addison Farmers Mutual Ins. Co., 90 Ill. App.2d 417, 233 N.E.2d 42 (1967).

The failure to file an abstract or excerpts is a serious omission and the appeal is dismissed.

Appeal dismissed.

Schwartz and McNamara, JJ., concur.

120 I.A.2 124

No. 69-155 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

ROBERT CONNER,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	Appeal from the Circuit
	)	Court of the Nineteenth
ILLINOIS BELL TELEPHONE CO.,	)	Judicial Circuit, Lake
	)	County, Illinois.
Defendant-Appellee.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

The plaintiff brings this appeal from an order entered July 1, 1969, by the Circuit Court of Lake County that dismissed his second amended complaint for failure to state a cause of action.

The second amended complaint alleged that the plaintiff operated an automobile service station at the intersection of Route 59 and 14 in Barrington known as "Bob's Sinclair No. 1". On January 10, 1966, he opened a second station at the interesections of Routes 22 and 12 in Lake Zurich, called "Bob's Sinclair No. 2", and contracted with Illinois Bell Telephone for the installation of telephone service. Pursuant to his request, Illinois Bell did install a telephone at the second station and assigned it the number 438-7309. Thereafter, Illinois Bell published a telephone directory for use in the Barrington,

Lake Zurich and Wauconda areas for use during the period of May 1, 1966, to May 1, 1967, that included a listing for the plaintiff as follows:

"BOB'S SINCLAIR SERV (at)

1 100 W NW Hwg B - - - - - 380-9809

2 Hwy 22 & 12 LZ - - - - - 438-7309 "

The complaint further alleged that the plaintiff discontinued business at the service station in Lake Zurich May 31, 1966, and upon his request Illinois Bell discontinued service on # 438-7309. On or about October 1, 1966, the number was reactivated or reassigned to another telephone subscriber, in competition with the plaintiff. Illinois Bell failed to correct the directory to notify the general public of the change. As a result a number of potential customers of the plaintiff were diverted to competitors of the plaintiff and he claimed damages in the amount of $15,000.

It is, of course, well known that Illinois Bell Telephone is a public utility licensed under the Public Utilities Act and that the contractual relations between Illinois Bell and its subscribers are governed by certain tariff provisions on file with the Illinois Commerce Commission. The tariff on file " . . . is necessarily a component and integral part of its contracts and relationships with its subscribers, expressly or by implication or by operation of law; the subscribers are bound thereby, as is the company; it cannot deviate and its subscribers cannot deviate therefrom . . . " Illinois Bell Tel. Co. v. Miner, 11 Ill. App. 2d 44, 58.

The applicable tariff on file with the Commerce Commission in October of 1966 provided in part as follows:

> "10. TELEPHONE NUMBERS - The subscriber has no property right in the telephone number or any right to continuance of service through any particular central office. The Telephone Company may change the telephone number or the central office designation, or both, of a subscriber whenever it deems it desirable in the conduct of its business so to do."

The plaintiff recognizes that he had no property interest in the assigned number and that he was subject to the terms and provisions of the prevailing tariff. He does maintain, however, that the tariff relates only to the contractual relations between Illinois Bell and its subscribers and presents his case, at least on appeal, on a theory of tort.

The plaintiff contends that Illinois Bell made a representation in their directory that he could be contacted and his services obtained through the use of the assigned number. He further maintains that Illinois Bell knew that the directory was essential to the use of the telephone system and would be used and relied upon by other subscribers. At the time of the reassignment of the number to a different subscriber, if not before, Illinois Bell knew that in fact the plaintiff could not be reached at that number and the continued use of the directory became, as a consequence, a misrepresentation and an actionable fraud.

The elements of fraud were enumerated in the case of Bennett v. Hodge, 374 Ill. 326 at 331 and 332 as follows:

> "It is agreed all of the following elements must be proved in an action based on fraud: (1) The misrepresentation must be of a statement of fact; (2) it must be made for the purpose of influencing the other party to act; (3) it must be untrue; (4) the party making the statement must know or believe it to be untrue; (5) the person to whom it is made must believe and rely on the statement; (6) the statement must be material."

It has been generally agreed that the existence of a fraud depends on the special facts of each case and no general rule has been followed. Peterson v. Yacktman, 25 Ill. App. 2d 208, 214; Majewski v. Gallina, 17 Ill. 2d 92, 99. Ordinarily, a fraud will only lie where a fraudulent intent--the intention to deceive--can be proven. Dahlke v. Hawthorne, Lane & Co., 36 Ill. 2d 241, 245.

We believe that the facts alleged in the complaint before us fall far short of establishing an actionable fraud. At the time Illinois Bell distributed the directories, the representation in regard to the plaintiff were true. It could, of course, not be responsible for the fact that the plaintiff ceased to do business at that location or that he requested that service to the assigned number be discontinued. There is nothing in the complaint that could be used to establish an intention to deceive on the part of the defendant or that it violated any duty owed to the plaintiff.

In any event, we do not agree that the matter is not controlled by the tariff or that the tariff is necessarily limited to the contractual relationship between the telephone company and its subscribers. In the case of Sarelas v. Illinois Bell Tel. Co., 42 Ill. App. 2nd 372, 375, the plaintiff brought suit on the grounds that the telephone company had violated "a legal duty" by the unauthorized disconnection of an extension line on his telephone. The court held that the existence of a legal duty depended on the provisions of the tariff and that the suit must be brought as a breach of the tariff or not at all.

Here, the tariff established that the plaintiff had no property right in the assigned numbers and that the telephone company

could change his number or reassign it as it saw fit. There is nothing in the tariff that requires the telephone company to suspend the use of a discontinued number and, indeed, such a procedure itself might be unlawful. The plaintiff suggests that calls to the number should have been forwarded to his other location, a service that is available on request, but no request was ever made.

For the reasons stated, the judgment of the trial court should be affirmed.

JUDGMENT AFFIRMED.

MORAN and SEIDENFELD, J. J., concur.

NO. 69-137 120 I.A. 149

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ABST.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Madison County.
vs.	)	Honorable Trafton Dennis, Judge Presiding.
ELDER MACK, Defendant-Appellant.	)	

Goldenhersh, J.

Defendant, Elder Mack, was tried by jury in the Circuit Court of Madison County, convicted of the crime of Murder and sentenced to the Illinois State Penitentiary for not less than 25 nor more than 65 years.

Robert Lee Lunsford testified that on Wednesday, June 19, 1968 at approximately 10:30 to 11:00 P. M., in response to a call from his daughter, he looked out a window and saw a taxicab standing in front of his home. Two doors of the cab were open. He went out to the cab and saw a man lying a short distance to its rear. He saw no one else in the vicinity of the cab. The police were called.

Delbert Clemons, a deputy sheriff of Madison County, was dispatched to investigate "a report of a cab driver laying in the middle of the road", and he and his "riding partner" arrived at the scene at 11:33 P. M.. He found a taxicab sitting in the middle of the road, the motor was running and both front doors were open. He found a man lying 55 paces from the vehicle. He could see two wounds in the man's back and one behind his right ear.

John Onesky, the riding partner, testified to substantially the same matters.

Demos Nicholas, a deputy sheriff, was present at the hospital when an autopsy was performed on the body of the cab driver, identified as Swansey Martin. Dr. John Mueller, the pathologist, removed two bullets from the body and gave them to Nicholas. The bullets were placed in an envelope which was initialed by Nicholas and the doctor, and Nicholas delivered them to Chief Deputy Sheriff Frank Schmidt. He stated that a third bullet removed from the body was fragmented. Upon reference to his notes he testified he was in error when he stated he had given the envelope containing the bullets to Schmidt. He stated that on June 22, 1968 he took the bullets and a Rohm revolver to the St. Louis, Missouri Police Department. The revolver was test-fired in his presence and the slugs from the gun were compared to the two in the envelope.

The slugs removed from the body of the deceased were returned to the sheriff's evidence room. On July 12, 1968, Nicholas took them and a different Rohm revolver to the St. Louis Police Department. He had been given the gun by Deputy Sheriff William (Dilly) Connors. He identified an envelope as containing several .22 caliber short bullets taken from the second gun. Further references to a weapon in this opinion are to this second revolver.

Dr. Mueller testified that upon examination of Martin's body he found three lethal bullet wounds, one to the head and two to the chest wall. The two bullets from the chest cavity were recovered "fairly intact", the bullet removed from the skull was fragmented. The two bullets were marked by use of a hemostat to make a slash across the base.

Robert Rizzi, a deputy sheriff, testified that on August 5, 1968, he received an envelope from the St. Louis Police Department, placed it in the evidence room, and when Nicholas returned from vacation he again took charge of the sheriff's evidence room. This envelope contained a revolver, bullets taken from the revolver, and the two slugs removed from the body.

Detective Paul Reeder, a firearms examiner for the St. Louis Police Department, testified he received the revolver, bullets and slugs from Nicholas on July 12, 1968, and returned them to Rizzi on August 5, 1968.

Detective Joseph Brasser, a firearms examiner with the St. Louis Metropolitan Police Department, testified he had been with the police department for 15 years, had been trained for two years by another firearms examiner, was an instructor on firearms for 3 years, and had been a gunner's mate in the Navy. He had been an examiner for 3½ years. He described the method used in making a ballistics test and stated that in his opinion the slugs removed from the body were fired from the revolver.

On cross-examination he described the Rohm revolver as being a fairly common weapon of German origin, priced approximately $12.00 to $22.00. He stated that in comparing two such guns manufactured in close sequence the number, twist and width of the grooves would be the same but the striations would be different. The Rohm guns are peculiar in that they have 8 "lands" and "grooves" with a right twist.

William Connors testified that a lady named Betty Mack gave him the gun in question sometime in July and he gave it to Demos Nicholas. Nicholas made a record of the serial number.

A clerk in a store in Alton produced its record of firearm

sales. An entry made by him showed the gun to have been sold to defendant on June 17, 1968. He identified defendant as the purchaser. The record showed the sale of six Rohm guns in a short period of time. The serial numbers indicated manufacture at approximately the same time.

Patricia Atwood, a driver and dispatcher for American Cab Company, testified that on June 19, 1968, at approximately 11:10 P. M. she had dispatched Martin's cab to the area where the cab and body were found.

Mrs. Betty Mack, an aunt of the defendant, testified she was given the revolver or one similar to it by defendant's brother a day or two before she turned it over to Connor.

Mrs. Mary Mack, wife of defendant's brother, George, testified that in June of 1968 she and George were living in Evanston. Defendant came to their home late one night in June and later told her he had given her husband a gun. She could not identify the gun in evidence as being the same one.

Marjorie Christeson testified that on June 19, 1968 at approximately 8:00 P. M. defendant and another man came to the taxicab office operated by the witness and her husband. With these two men as passengers, she dispatched a cab to an address in St. Louis. The cab was gone about 15 minutes.

Jack Canaday testified he drove the cab on the occasion described by Mrs. Christeson. He could not identify the defendant. He drove across the river to St. Louis and discharged his passengers at the "first cross-over" of the highway. There were no buildings at the place where his passengers alighted from the cab.

Defendant testified that he had bought a gun similar to the one

in evidence on a Monday. He placed it in his dresser and did not see it again until Wednesday or Thursday when he took it to his brother's house in Chicago. He lived in Chicago for several weeks and then moved back to Alton with his brother and his wife. He denied being in the vicinity of the homicide. His room and dresser were open at times when he was not there.

Following defendant's testimony, the court admitted, without objection, an exhibit showing defendant had been previously convicted of the offense of Theft and sentenced to the penitentiary.

We shall first consider defendant's contention that The People failed to prove beyond a reasonable doubt that a crime had been committed and failed to prove that the accused had committed it. Defendant argues the trial court erred in denying his motions for directed verdict.

In our opinion the evidence of defendant's purchase of the gun two days prior to the date of the shooting, the testimony of the firearms examiner and the evidence of defendant's being in the Alton area on that night are sufficient to support the guilty verdict. As stated in The People v. Bernette, 30 Ill. 2d 359, at page 367, "The jury need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances relied upon to establish guilt, but it is sufficient if all the evidence, taken together, satisfies the jury beyond a reasonable doubt of the accused's guilt."

Defendant next contends the slugs and pistol were admitted in evidence without proper foundation, arguing there is insufficient evidence that they were in the same condition at trial as at the time of the occurrence. He also contends the witness lacked the qualifications requisite to expression of an expert opinion. Both contentions are adequately answered in The People v. Fisher, 340 Ill. 216, 236.

Defendant contends that certain testimony elicited from Mrs. Christeson and Jack Canaday, and a comment of the State's Attorney during final argument, to all of which objections were sustained, were so prejudicial, that despite the court's rulings he was deprived of a fair trial.

During the direct examination of Mrs. Christeson the record reflects the following:

"Q. Just relate what the conversation was between you and the Defendant.

A. As I remember it this boy asked how much it was across the bridge.

Q. Did you dispatch the cab?

A. Yes, I did.

Q. Did you do anything before you dispatched the cab?

A. Yes, I asked the driver to please leave his money with me.

MR. TRONE: I object to that, Your Honor.

THE COURT: The objection is sustained and the answer is stricken and the Jury is instructed to disregard it.

MR. SCROGGINS: What did the driver do before he left?

A. He left his money with me - his bills not his change.

Q. Why did he do that?

MR. TRONE: I object.

THE COURT: Objection sustained.

MR. SCROGGINS: Was the cab dispatched?

A. Yes.

Q. Do you know how long the cab was gone, just answer yes or no.

A. Approximately I would say, ten - maybe fifteen minutes;

the next call came in at 8:10.

* * * * * * * * * * * * * * *

Q. When you dispatched the cab where did you dispatch the cab to?

A. Just across the bridge into Missouri.

* * * * * * * * * * * * * * *

MR. SCROGGINS: Did you have another destination for this cab earlier, this same cab and these same people?

MR. TRONE: I object.

THE COURT: Objection overruled.

MR. SCROGGINS: The same people and the same cab, did you have a different destination earlier?

A. I was first asked...

MR. TRONE: I object.

THE COURT: The objection is sustained.

MR. SCROGGINS: Just state whether you had a different destination with these same two people and this cab?

A. Yes.

Q. What destination was that?

A. St. Louis.

Q. Where in St. Louis?

A. Broadway and Taylor.

Q. When did this destination change?

MR. TRONE: I make objection to that.

THE COURT: The objection is sustained."

The following appears in the direct examination of Jack Canaday:

"Q. Did you observe anything when you turned around and

came back, you did turn around and come back?

A. Yes.

Q. Did you observe anything when you turned around and came back?

MR. TRONE: I object.

THE COURT: Objection overruled.

WITNESS: Yes, I did.

Q. What did you observe?

A. The same two men on the other side of the highway hitch-hiking back to Alton.

MR. TRONE: I object.

THE COURT: The objection is sustained as to the last answer, the last part of that answer and the Jury is ordered to disregard it."

"MR. SCROGGINS: Did you see any individuals when you turned the cab around?

A. As I turned the cab around?

Q. Yes.

A. No, sir. You see, I had to drive further up the road to the next cross-over, the cross-over on the other side of the divided highway.

Q. Did you see the two people then?

A. Yes.

Q. What were they doing?

A. They were hitch-hiking.

MR. TRONE: I object to that.

THE COURT: The objection is sustained."

During Canaday's testimony on redirect the following occurred:

"MR. SCROGGINS: Did you do anything before you left the cab

office?

MR. TRONE: I object.

THE COURT: Objection sustained."

During final argument the record shows the following:

"If you believe the testimony of Mrs. Christeson he went to a cab company in Alton in the company of another individual - that a destination was fixed in St. Louis - that the cab driver was asked to remove the money from his pocket.

MR. TRONE: I object.

THE COURT: The objection is sustained."

"MR. SCROGGINS: I submit to you, Ladies and Gentlemen of the Jury that Elder Mack bought a 22 caliber Rohm gun on the 17th day of June, 1968 - that he was in Alton, Illinois on the 19th day of June, 1968 - that he took one cab ride which was unsuccessful.

MR. TRONE: I object to that, Your Honor.

THE COURT: Objection sustained as to that form of the argument.

MR. SCROGGINS: That he took a second cab ride.

MR. TRONE: I object to the reference that he is attempting to make.

THE COURT: It's argument."

This court is reluctant to reverse a judgment based upon evidence sufficient to sustain it, but it is our duty to do so when the record shows defendant did not receive a fair trial. It is true the court sustained the objections of defense counsel to the testimony of Mrs. Christeson that she had asked the cab driver to leave his money with her, but in our opinion the cumulative effect of the insinuations of the questions and the argument are so prejudicial as to have effectively deprived defendant of a fair trial. The People v. Lewis, 313 Ill. 312, 320. He is entitled to a trial by a jury uninfluenced by improper

testimony or argument, and the judgment is accordingly reversed and the cause remanded for a new trial.

Defendant has argued other alleged errors which are not discussed for the reason that they are not likely to recur upon retrial.

The court is appreciative of the excellent brief and argument of appointed counsel.

Judgment reversed and cause remanded for new trial.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH IN FULL

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 1st day of December, in the year of our Lord one thousand nine hundred and sixty-nine, within and for the Second District of Illinois:

Present -- Honorable CHARLES H. DAVIS, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable THOMAS J. MORAN, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On

the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 69-173

Publ. in Full

FILED

MAR 2 - 1970

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. ROBERT KEARN MC GARY, Defendant-Appellant.	)	Appeal from the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois.

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

The defendant was indicted for the unlawful sale of narcotic drugs by the grand jury of Kane County. Thereafter, the attorney for the defendant filed a motion with the trial court to order the prosecution to furnish a list of all prosecution witnesses and their last known addresses, including home addresses. The trial judge ruled that the state must furnish a list of all witnesses and their last known addresses but that they need not furnish the home addresses of such witnesses who were state narcotic agents. The order further found that "...an immediate appeal from this Order may materially advance the ultimate termination of this litigation and that the defendant may take an immediate appeal from this Order...."

Under Section 304 of the Supreme Court Rules (Ill. Rev. Stats. 1967 Ch. 110 A par. 304) an appeal "may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying enforcement or appeal." However, not all civil appeals rules apply to criminal appeals. Section 612 of the Supreme Court Rules (Ill. Rev. Stats 1967 Ch. 110 A par. 612) enumerates those civil appeals rules that are applicable to criminal appeals and Rule 304 is not among them.

For that reason we must conclude that the order of the trial court was not appealable despite the language contained therein and that this appeal should be dismissed.

APPEAL DISMISSED.

DAVIS, P. J. and MORAN, J. Concur.

NO. 68-98

120 I.A.2 225 (1)

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ABST.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- GARY KUYKENDALL and KENNETH BELL, Defendants-Appellants.	Appeal from the Circuit Court of Gallatin County. Honorable Don A. Foster, Associate Judge Presiding.

Clark, J.

The defendants, Gary Kuykendall and Kenneth W. Bell, along with Frank A. Churchwell were indicted by the Grand Jury of Gallatin County. The eleven count indictment charged all three defendants with two counts of Attempt to Commit Armed Robbery, two counts of Attempt to Commit Robbery, three counts of Burglary and four counts of Aggravated Battery. All counts in the indictment arose out of one incident.

Prior to the trial of the two defendants, Churchwell entered a plea of guilty to Count Nine of the indictment which charged the defendants with Aggravated Battery (committing a battery on Moses Kanady). After accepting the plea of guilty from Churchwell, the Court sentenced him to the Illinois State Penitentiary for a period from four to nine years. Counts 10 and 11 charging Aggravated Battery were dismissed on defendant's Pretrial Motion, and the jury trial proceeded on the remaining nine counts charging Aggravated Battery, Burglary, Attempt to Commit Armed Robbery, and Attempt to Commit Robbery.

As to defendant Gary Kuykendall, the jury found him guilty of Burglary, Attempt to Commit Armed Robbery and Attempt to Commit Robbery. The jury failed to return any verdicts as to the remaining offenses in the indictment.

After considering Defendant Kuykendall's Post Trial Motion, the Trial Court allowed said motion as to the count charging the offense of Attempt to Commit Robbery. The judgment and sentence previously entered as to this count were vacated. The Court denied the motion as to the offenses of Burglary and Attempt to Commit Armed Robbery.

A hearing was held in aggravation and mitigation. Thereafter, the Court sentenced the Defendant Kuykendall to the Illinois State Penitentiary for a period of five to ten years on the charge of Burglary, and a period of five to fourteen years on the charge of Attempt to Commit Armed Robbery with the sentences to run concurrently.

Defendant Bell was tried at the same time as Kuykendall, and the jury returned only one verdict which found Bell guilty of Attempt to Commit Robbery. Defendant's Post Trial Motion was denied. After a hearing in Aggravation and Mitigation, Bell was sentenced to the Illinois State Penitentiary for a period of five to ten years. The two defendants have appealed from the judgment on the verdicts and sentences.

The evidence indicates that on December 2, 1967, the two defendants and Churchwell were driving in the vicinity of the intersection of Illinois Routes 1 and 13 in Gallatin County when they blew out a tire on the automobile. In changing the tire, they found there was a leak in the spare tire. They drove to the inter-

section where they were going to try to buy a tire as there were three service stations and a restaurant on the four corners. First, they went to the Texaco Station and inquired. The attendant told them he did not have the right size tire, and they went next to the Standard Station attended by Moses Kanady. Kuykendall and Churchwell went into the Standard Station while Bell drove across the highway to the restaurant where he thought he had seen his girl. Churchwell asked about the tire and followed the service station attendant, Moses Kanady, to the back of the station to look at tires. Churchwell testified for the defense that he hit Moses Kanady on the head, and he and Kuykendall ran out of the station when Kanady obtained a shotgun and was attempting to load it. The two men ran to the car being driven by Bell at the time, which was parked across the highway at a service station. The three men left quickly and drove to New Shawneetown. They stopped at the Red and White Tavern where the Sheriff of Gallatin County found them about one-half hour later and began questioning them.

The Sheriff took the two defendants and Churchwell to his office. Later that night they were taken to the service stations at the intersection and to the hospital for identification. That night while in the hospital, Moses Kanady identified Kuykendall and Churchwell as the two men who were in his station.

One of the points counsel for both defendants have raised in their appeal is that the Trial Court did not properly instruct the jury. No instructions were submitted by the State or Defense defining the crime of Attempt, Armed Robbery or Robbery. Neither were issues or burden of proof instructions submitted by counsel or given by the Court to assist the jury in their deliberations.

In the Instruction Conference both Defense Counsel objected to the State's Instructions for the reason that no instructions as to issues, burden of proof, and definition of armed robbery were submitted. Defense Counsel did not offer or submit instructions on these points.

Although it has been held that the Trial Judge has no duty to give instructions on his own motion, where the defendant does not request them, we believe that the Trial Judge would be abdicating his responsibilities by permitting the jury to retire for its deliberations without defining the legal concepts relating to the crimes charged. People vs Davis 74 Ill App 2d 450.

The verdicts of the jury cannot be permitted to stand because of the insufficiency of the instructions given the jury. This case was tried prior to the adoption of Supreme Court Rule 451 relating to Illinois Pattern Instructions for Criminal Jury Trials which became effective January 1, 1969. The pattern instructions contain both definitions of crimes and examples of burden of proof and issues instructions to be used in appropriate cases.

The two defendants further contend that the jury's failure to return verdicts as to certain crimes charged in various counts should be considered a finding of not guilty as to those offenses. The Court has so held in Thomas v People 113 Ill 531, People v Potts 403 Ill 398, and People v Higgins 86 Ill App 2d 202.

Where the jury did not make a finding as to offenses charged in the various counts, the defendants cannot be retried for these offenses.

The defendants have raised other points in their brief alleging error; however, in view of the position we take on the question of

instructions, we see no reason to comment on them.

The judgment and sentence as to both defendants are reversed, and the cause is remanded for a new trial on the offenses wherein the two defendants were found guilty.

Reversed and remanded.

Concur: /s/ Joseph H. Goldenhersh

Concur: /s/ Edward C. Eberspacher

PUBLISH ABSTRACT ONLY.

No. 69-81

120 I.A.3 225 (2)

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ABST.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. WILLIAM EUGENE WOOFF, Defendant-Appellant.	Appeal from the Circuit Court of Madison County, Illinois. Honorable Joseph J. Barr, Judge Presiding.

EBERSPACHER, J.

The defendant, William Eugene Wooff, was convicted, by jury verdict, of burglary with intent to commit theft in violation of Ch. 38, § 19-1, Ill. Rev. Stat. 1967. A motion for new trial was denied, and defendant was sentenced to an indeterminate term of 1 to 8 years in the state penitentiary. Defendant seeks to reverse the lower court's denial of his motion for new trial.

The State's evidence was adduced solely from the testimony of the victim of the burglary, Loyd Ray Shaw. Shaw testified that on the evening of November 30, 1968, he returned from work to his home in Alton. He parked his car in the driveway and entered his home through the front door, which he had secured that morning. He noticed the window in the front door was broken out. As he entered he met the defendant face to face coming from the bedroom in the entry hall. Shaw stated that defendant did not have permission to be in the house at that time. The defendant was carrying a camp stove in his left hand and an unloaded pistol was in his belt; both items belonging to Shaw. Shaw testified defendant took the pistol from his belt and as he did so, Shaw grabbed the barrel and took the pistol from him. Shaw then ordered defendant to lie down which he did and Shaw proceeded to use his own belt to tie defendant's hands behind him as he lay face down on the floor. Shaw then shouted to someone on the street in front of his home to call the police.

Shaw testified the glass from the broken window was scattered over the entry hall which was approximately 4 or 5 feet square. Also, all the lights in the home had been turned on. The pistol was kept in the bedroom between the mattress and the box springs. The bedroom was "torn up" and a half bottle of beer was tipped over in the bedroom and in addition Shaw found a half empty pint bottle of wine in the back room; neither of which were there when Shaw left the house in the morning. The defendant made no other statement at the time of the incident other than, "you might as well go ahead and shoot". He further testified that in his opinion defendant was drunk at the time he accosted him.

Complainant and defendant were acquaintances, had on numerous occasions drunk together, and defendant had on previous occasions been hired by Shaw to help make repairs to Shaw's house, but did not have permission to enter Shaw's locked house on the date of this occurrence.

Defendant took the stand in his own defense and denied remembering the incident. He testified he had been drinking at several bars steadily from sometime before noon on the day in question. He stated that sometime in the late afternoon he lost track of the time and remembered nothing from that point on until waking up in jail the following day.

The following assignments of error are made on this appeal:

(1) that there is insufficient evidence to show an intention on the part of defendant to commit a theft on the premises at the time he made his entry therein.

(2) that no instruction was given on the crime of "theft".

(3) that the forms of verdict given to the jury were improper where the "not guilty" form was not the exact converse of the "guilty" form.

(4) that the State's Attorney"s final argument was so improper and incoherent as to cause fatal prejudice.

(5) that the appointed defense counsel's conduct of the trial was so inept as to amount to no representation at all.

It is clear from the record of trial that there was sufficient evidence from

which the jury could find an intent on the part of defendant to commit a theft in the Shaw residence at the time of his entry therein. The evidence is circumstantial but this is not of itself crippling because "circumstantial evidence is legal evidence, and where it is of so strong and convincing a character as to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, it is the duty of the jury to act upon it and find the defendant guilty, and such verdict must be sustained". People v. Wilson, 387 Ill. 563, 567 (1944), 56 N.E. 2d 630, 632. The intent to commit theft may be inferred from the evidence and it is within the province of the jury to consider all the facts and circumstances in determining the question of intent.

> "Intent to commit burglary can be inferred from the facts and circumstances proved in the case. . . . . Burglary can seldom be proved by direct evidence of the actual breaking and entry, and the inference of guilt in most cases must necessarily be drawn from other facts satisfactorily proved." People v. Geisler, 348 Ill. 510, 516 (1932), 181 N.E. 328, 330.

Defendant's testimony, taken together with Shaw's opinion that defendant was drunk, did not compel the jury to find that he was so drunk that he had no intent. The circumstantial evidence is not consistent with defendant's innocence. The use of the word "intent" in our Criminal Code is limited to conscious objective or purpose to accomplish a desired result. See Committee Comments, Ch. 38, § 4-3, Ill. Anno. Stat. and § 4-4 Criminal Code of 1961. The testimony of Shaw, whose credibility was for the jury to determine, adduced evidence of a forcible, unauthorized entry of his residence. Parts of the residence was ransacked, and the defendant was discovered inside with property of the victim in his hands. We feel this is sufficient evidence of burglary.

Defendant complains that although the People gave an instruction on burglary without objection and defendant also gave an instruction defining the elements of that crime which must be proved beyond a reasonable doubt, there was no instruction given to define the crime of theft. Defendant did not tender such instruction, and raised no objection to any instructions or the absence of such instruction in his post trial motion. As a result any error with reference to instructions was waived.

See People vs. Kelly, 105 Ill. App. 2d 481, 485. While Illinois Pattern Jury Instructions Criminal contains issue instructions on special types of theft (By Unauthorized Control, By Deception, By Threat, etc.) there is no issue instruction or definition instruction on theft generally, and the burglary instruction as well as the issue instruction on burglary found therein do not include the elements or issues of the crime of theft. In The People v. Reed, 33 Ill. 2d 535, 213 N.E. 2d 275, it was contended that the meaning of the word "theft" used in the burglary statute was so complex and hypertechnical as to render that statute unconstitutionally vague and indefinite. The Court felt that the word "theft" as there used was not so difficult of comprehension that it could not be reasonably understood by persons of ordinary intelligence without further definition. The appeal to the Supreme Court of the United States was dismissed for want of substantial federal question. 87 S. Ct. 68, 385 U. S. 10, 17 L. Ed. 2d 9. As a result we cannot say that defendant's trial counsel displayed any lack of competency by failure to make objections to the instructions given, or by failing to raise that issue in the post trial motion.

The following forms of verdict were given to the jury:

"We, the jury, find the defendant, William Eugene Wooff, Guilty of Burglary" and "We, the jury, find the defendant, William Eugene Wooff, Not Guilty".

The Illinois Supreme Court has held that:

> "The test in determining the sufficiency of a verdict and the judgment of conviction based thereon is whether or not the intention of the jury can be ascertained with reasonable certainty. Verdicts are to be liberally construed and all reasonable intendments indulged in their support. A verdict is not to be held insufficient unless from necessity there is doubt as to its meaning; . . . . . ."
> People v. Bailey, 391 Ill. 149, 152-3, 62 N.E. 2d 796, 798.

Defendant claims error in that the two forms are not the exact converse. We find no error here. In People v. Frenchwood, 27 Ill. 2d 412, 189 N.E. 2d 328, the Court found no error in instructions which required the jury to return a "verdict of guilty of robbery while armed with a dangerous weapon" or a "verdict of not guilty".

The claimed error arising from remarks of the State's Attorney in his closing argument were waived for lack of objection, People v. Donald, 29 Ill. 2d 283 (1963),

194 N.E. 2d 227, they were not of such nature as to require a new trial in the absence of objection.

Defense counsel's representation was not of such low caliber as to be incompetent. The record of this trial when reviewed as a whole shows adequate representation. Counsel's instructions were adequate on the law, his examination and cross-examination of the witnesses shows a knowledge of the case and an honest effort to establish a defense of drunkenness such as to render defendant incapable of forming the requisite intent. We cannot predict what the police who took defendant into custody would have testified had they been called to testify as to defendant's intoxication. Whether or not another counsel with the benefit of hindsight would have tried the case in exactly the same manner is not the test. Review of appointed counsel's competence does not extend to those areas involving the exercise of judgment, discretion or trial tactics and this is true even though appellant, appellate counsel or the reviewing Court might have proceeded in a different manner. People v. Martin, #41435 (Nov. 1969), ___ Ill. 2d _____, _____ N.E. 2d _____; People v. Wesley, 30 Ill. 2d 131, 136, 195 N.E. 2d 708, 711.

We commendappointed counsel for his presentation of the issues. We find no substantial error and the judgment of the trial court is affirmed.

Judgment Affirmed.

CONCUR: /S/ George J. Moran

CONCUR: /S/ Joseph H. Goldenhersh

PUBLISH ABSTRACT ONLY

53363

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

JUAN G. ALVAREZ,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Hon. David Cerda, Presiding.

MR. JUSTICE ADESKO DELIVERED THE OPINION OF THE COURT:

Defendant appeals his conviction for the offense of unlawful use of weapons for which he was sentenced to one year probation, upon the condition that he serve the first 60 days thereof in the House of Correction. Defendant contends that he was denied the right to a trial by jury in that he did not knowingly waive that right and that the trial court's appointment of the Public Defender was improper because defendant had already employed counsel of his choice.

On January 25,1968, the defendant was charged with a violation of Chapter 38, Sec. 24-1 (a) (4), Ill. Rev. Stat. (1967), for knowingly carrying a concealed weapon about his person. Defendant was admitted to bond on January 25,1968. On February 8, 1968, the complaint was filed, the amount of bond was increased and trial continued to April 4,1968, on motion of the defendant. The case was again continued on defendant's motion to May 2, 1968. On this last date, the defendant answered that he was not ready for trial, stating as his reason that: "I am going to get a lawyer next week." The trial court then appointed the Public Defender to represent the defendant and the case was passed for a few minutes. When the case was called again, defendant's appointed counsel moved to suppress the evidence in this case. The arresting officer was examined with regard to the arrest and discovery of the concealed

weapon carried by the defendant. The motion to suppress was denied and defendant's counsel stipulated that the testimony on the trial would be the same as elicited upon the hearing of the motion to suppress.

At this point the following discussion took place between the court, counsel and the defendant:

> "THE COURT: As soon as I ask him- Do you wish to be tried by a jury of twelve men and women to decide whether you are guilty or not guilty or do you want to have the trial here?
>
> THE DEFENDANT: I don't know.
>
> THE COURT: Talk to the public defender.
>
> MR. SCUDDER: [Defendant's attorney] Jury is waived, is that right Mr. Alvarez?
>
> THE DEFENDANT: Yes, sir."

A plea of not guilty was then entered. The gun and its contents were then admitted into evidence and the State rested its case. Defendant then admitted having the gun on the night in question. There was a finding of guilty and the application for probation was accepted by the court and defendant was admitted to probation.

On May 23,1968, a hearing was held on a motion for a new trial presented by Attorney Jerome A. Goldberg, who had filed an appearance on behalf of the defendant on May 16,1968. The motion alleged that defendant had employed counsel who told him to get a continuance; that the court erred in denying the continuance; that the evidence was insufficient; and that defendant could not comprehend the nature of the charge due to his age and inability to understand the English language. The trial court denied the motion.

With regard to the question of jury waiver, the State has argued that the failure to mention this question in defendant's

motion for a new trial precludes this court from considering it on review. Nevertheless, in view of the possible constitutional implications of this question, we will explore the merits of defendant's contentions.

The question whether a knowing and understanding waiver of the right to a jury trial has been made must be resolved from the facts and circumstances of each case. No definite or fixed standard has been established. People v. Wesley, 30 Ill. 2d 131, 195 N.E. 2d 708 (1964). The instant case reveals that the trial judge inquired as to whether defendant desired a jury trial or bench trial. Defendant at first answered indecisively, but his appointed counsel then asked defendant if the jury was to be waived to which the defendant responded in the affirmative. We find no merit in defendant's assertion that he had difficulty with the English language since the record disclosed that he had no difficulty in testifying at the trial and successfully filled out an application for probation. The record reveals that defendant was given an opportunity to confer with his appointed counsel and acquiesced in the representation of that counsel.

We have found that in the cases of People v. Richardson, 32 Ill. 2d 497, 207 N.E. 2d 453 (1965) and People v. King, 30 Ill. App. 2d 264, 174 N.E. 2d 213 (1961), a jury waiver was approved where the defendant's attorney advised the court that a jury will be waived. As recently noted by the Illinois Supreme Court in People v. Sailor, 43 Ill. 2d 256, N.E. 2d (1969), the defendant's reliance upon his attorney where counsel waived a jury trial in the presence of and without objection of the defendant was sufficient to justify a waiver of that right.

We are of the opinion that the procedures undertaken by the trial court in this case sufficiently discharged its duty to determine that defendant had knowingly and understandingly waived his right to trial by jury.

The defendant's next contention is that the trial court improperly appointed the Public Defender to represent the defendant since he had previously procured counsel of his choice. Defendant argues that the trial court erred in not granting a continuance to the defendant. The record reveals that defendant had been released on bond since his arrest on January 25,1968 and that the court had granted two continuances of this case upon the defendant's motion. Defendant argues that prior to trial he had employed Jerome A. Goldberg as his attorney. However, the record shows that defendant's counsel did not file an appearance until two weeks after the trial had been completed. There is nothing in the record to indicate that defendant was represented at the time his case was called for trial on May 2,1968. The defendant, in fact, stated to the court that he was going to get a lawyer next week.

The rule is well established that the denial of a continuance rests in the discretion of the trial court and to reverse such a ruling the defendant must show substantial prejudice of his rights from that denial. People v. Solomon, 24 Ill. 2d 586, 182 N.E. 2d 736 (1962). Cert. Denied 371 U.S. 853. The record reveals that defendant's appointed counsel adequately conducted his defense in the face of overwhelming evidence of defendant's guilt of the crime and the accused's own admission of his guilt. In view of the representation afforded the defendant and the

evidence of his guilt, we conclude that the trial court did not abuse its discretion and no injustice resulted from the denial of the continuance.

Therefore, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED

Burman, P.J., and Murphy, J. concur.

(Abstract Only)